BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAYMOND D. GEORGE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,038,815
PRO FLEET TRANSPORTATION	)	
Respondent	)	
AND	)	
	)	
ARCH INSURANCE GROUP	)	
Insurance Carrier	)	

ORDER

Respondent appeals the June 4, 2008 preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was awarded benefits in the form of medical treatment and temporary total disability compensation (TTD) after the ALJ determined that this claim was subject to the Kansas Workers Compensation Act and that claimant was an employee of respondent Pro Fleet Transportation (Pro Fleet) on the date of accident.

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Samantha N. Benjamin-House of Kansas City, Kansas. Initially, Attorney Benjamin-House appeared at the preliminary hearing as the attorney for PeopLease Corporation (PeopLease) and its insurance company Arch Insurance Group. Even though respondent Pro Fleet had been notified of the hearing, no representative appeared on its behalf at the preliminary hearing. As Attorney Benjamin-House was not at the hearing to represent respondent Pro Fleet, she was not allowed to participate in the proceedings. It was noted at the hearing that a separate claim against PeopLease has been filed with the Kansas Workers Compensation Division (Division) and given Docket No. 1,038,814. That claim was not before the ALJ at the June 3, 2008 hearing and is not before the Board at this time. However, by letter of June 13, 2008, a copy of which was filed with the Division, Attorney Benjamin-House entered her appearance on behalf of Pro Fleet and its insurance company Arch Insurance Group, the same company insuring PeopLease. It should be noted that Attorney

Benjamin-House acknowledged at the preliminary hearing that an indemnification agreement existed between Pro Fleet and PeopLease, with PeopLease being responsible for any worker's compensation claim filed against Pro Fleet on behalf of employees of PeopLease.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held June 3, 2008, with attachments; and the documents filed of record in this matter.

ISSUES

1. Does the Division have jurisdiction over this matter? Respondent contends claimant was employed by a Missouri company with its principal place of business in Missouri, and that the initial contract of hire and later injury occurred in Missouri. Claimant contends the last act necessary to create an employment contract occurred in Kansas.

2. Who was claimant's employer on the date of accident? Pro Fleet alleges claimant was employed by PeopLease at the time of the accident. Claimant contends he was an employee of Pro Fleet and also contends, in the alternative, that he was a statutory employee of respondent Pro Fleet at the time of the injury.

3. Did the ALJ exceed his jurisdiction in granting benefits in this matter? Respondent's allegation that the ALJ exceeded his jurisdiction in this matter appears to stem from the issues raised in issue number 1.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working for Pro Fleet in November 2005 as a truck driver. Claimant first contacted Pro Fleet and applied for a job because his wife (now ex-wife) was a truck driver for them and he hoped to team drive for Pro Fleet. Claimant was faxed an application, which he filled out, signed and faxed back to Pro Fleet at its offices in Kansas City, Missouri. Claimant also signed an authorization for Pro Fleet to obtain his records. That authorization was also faxed to Pro Fleet. Claimant was then contacted by Jim Borman of Pro Fleet and advised that he had the job. Claimant and his wife then went to

respondent's facility where claimant submitted a urine sample for a drug test and, before the results of the test were even known, claimant began his first run.

Claimant drives on cross-country routes, sometimes being on the road for up to two weeks at a stretch. Claimant is contacted by Mr. Borman or by Pro Fleet dispatchers by telephone at claimant's residence in Girard, Kansas. Claimant is offered a choice of runs and loads. Claimant can accept or reject any or all of the offered loads. If he accepts a load, claimant picks up the load at Pro Fleet's facility in Missouri and, when he comes back from a run, he returns to Pro Fleet's facility in Missouri. It should be noted that throughout this relationship with Pro Fleet, claimant's duties remained the same, as a truck driver. Pro Fleet controlled the load, the destination, and when and where it was to be delivered. Claimant was paid by the mile.

Approximately six months after his hire, claimant began being paid by PeopLease. Claimant was contacted by Mr. Borman at claimant's home in Girard, Kansas, and advised of the new company ownership. Claimant was asked if he wanted to remain as a truck driver with PeopLease, and claimant said yes. From this record, it does not appear that any employment papers were completed after this company ownership change. Claimant's situation with the telephone contacts from Mr. Borman and Pro Fleet dispatchers and the offered loads remained the same.

Four to six months later, the company was sold to an entity identified as Pro Fleet ARL. Claimant was again contacted by Jim Borman and asked if he desired to remain as a truck driver, and claimant again agreed. Again, no paperwork was generated. Also, claimant continued to be contacted by the same dispatchers and offered the same loads and the same runs.

Approximately four to six months later, the company was bought by the original owners and renamed Pro Fleet. Claimant, as was the custom, was contacted by Jim Borman and asked if he desired to remain as a truck driver, and claimant agreed. Again, this contact came in the form of a telephone call to claimant's residence in Girard, Kansas. No paperwork was generated.

At some point in early 2007, claimant was contacted and advised that PeopLease had again become involved in the ownership of the company. Claimant was asked by Mr. Borman if he desired to remain as a truck driver. Claimant agreed and continued driving, with the contact regarding loads being the same. However, in this instance, claimant was provided several documents of employment, which he completed and took to the Pro Fleet facility in Missouri. These documents, which were marked as an exhibit at the preliminary hearing,[1] included an Application For Employment with PeopLease; a 401(k) enrollment form; a Terms of Employment document which clarified

[1] P.H. Trans., Cl. Ex. 3.

claimant's pay scale by the mile; a Leased Employee document which listed several possible benefits, including health, dental and life insurance; an acknowledgment that claimant was an at-will employee and a leased employee with the relationship subject to termination by either party; a W-4; and other traditional employment documents. The documents were dated either March 19 or March 20, 2007. From this time forward, claimant was paid by PeopLease. Claimant continued to be contacted by Jim Borman and the dispatchers of Pro Fleet, and the offered routes and loads remained consistent.

Claimant was referred by Pro Fleet for HazMat[2] training in order that he could deliver hazardous materials for Pro Fleet. Claimant was first referred for this training in July 2006, with Pro Fleet being designated as the company on the HazMat verification and completion-of-training card. Claimant was again referred for HazMat training in June 2007, again with Pro Fleet designated as the appropriate company. In October 2007, claimant was referred by Pro Fleet for his DOT physical.

On January 11, 2008, after returning from a run to California, claimant returned his truck to the Pro Fleet facility in Kansas City, Missouri, and went to the office with his paperwork. As claimant exited the office, he slipped on ice and injured his left wrist. Claimant was referred for medical treatment, with the ultimate determination being that claimant needed surgery to repair torn ligaments. Initially, Pro Fleet paid for the medical treatment and provided claimant with weekly workers compensation benefits. However, the surgery request was refused and the temporary benefits stopped approximately three weeks before the June 3, 2008 preliminary hearing. The ALJ, after considering whether claimant was a statutory employee of Pro Fleet or possibly an independent contractor, ultimately determined that claimant was an employee of both Pro Fleet and PeopLease and ordered Pro Fleet and its insurance company to provide claimant with workers compensation benefits.

As noted above, the attorney representing PeopLease at the preliminary hearing of June 3, 2008, then entered her appearance by letter dated June 13, 2008, and filed with the Division on June 16, 2008, as the attorney for Pro Fleet, naming the same insurance company for Pro Fleet as for PeopLease. That same attorney, by a separate letter of June 13, 2008, advised the attorney for the claimant of her entry of appearance for Pro Fleet and also advised that, as she still believed that Kansas was not the proper jurisdiction, the letter would serve as her 7-day notice that benefits would be terminated. That letter was faxed to the Division on June 20, 2008, and is a part of the documents filed of record in this matter. That letter is dated nine days after the Order of the ALJ granting claimant workers compensation benefits.

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[2] Hazardous materials.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

There is no dispute as to the events of January 11, 2008, when claimant slipped on the ice in the parking lot of Pro Fleet and injured his left wrist. The dispute centers around the proper party or parties responsible for claimant's workers compensation benefits and whether the Kansas Workers Compensation Act would apply to this injury.

Jurisdiction is conferred on the Kansas Workers Compensation Division where: "(1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless the contract otherwise specifically provides . . . ."[7]

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[3] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2007 Supp. 44-501(a).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[7] K.S.A. 44-506.

The Board must first consider where the contract was "made." The contract is "made" when and where the last necessary act for its function is done.[8] When that last necessary act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance.[9]

Respondent Pro Fleet is a company with its principal place of employment in Missouri. However, claimant argues that the employment contract was created in Kansas. The ALJ determined that each contact between claimant and Pro Fleet where claimant was offered a load or run constituted a new contract of employment. This Board Member does not agree with that determination. The telephone contacts with offers of runs and loads are merely a company organizing its deliveries across this country. The employment contract was created when claimant first contacted Pro Fleet and applied as a driver. Claimant filled out numerous employment documents and faxed them to respondent in Missouri and then went to Missouri, provided a urine sample for a drug test and was hired. That contract was created in Missouri as both the documents and the urine sample were provided to Pro Fleet in Missouri. Therefore, the last act necessary to create that employment relationship occurred in Missouri.

However, that is not the last employment relationship created in this curious situation. It appears the ownership of respondent's trucking company changed hands several times. At each change, claimant was contacted by telephone at his home in Girard, Kansas, and asked if he desired to continue as a truck driver for the new employer. This contact was always from Jim Borman, and always resulted in a positive response by claimant. The offer was from Mr. Borman, and the acceptance was from claimant. Thus, in each of these new ownership transfers, the new contract of employment was created when claimant accepted the new offer of a job. These last acts necessary to create each contract occurred in Kansas, thus, conferring jurisdiction on the Kansas Workers Compensation Division. None of these ownership transfers generated a need for new employment documents until the last transfer in early 2007. Even then, claimant was contacted by Mr. Borman and presented with the identical question, did he wish to remain as a truck driver? Claimant again answered yes. The paperwork which was requested by PeopLease with this last ownership transfer came after the verbal offer and acceptance of the job. Thus, the required paperwork from PeopLease does not deprive the Kansas Workers Compensation Division of jurisdiction to decide this matter.[10]

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[8] *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975).

[9] *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, ¶ 1, 512 P.2d 438 (1973); see Restatement (Second) of Contracts, § 64, Comment c (1974); *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 3 P.3d 551 (2000).

[10] *Shehane, supra.*

> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.[11]

The Board must next decide which entity was the claimant's employer on January 11, 2008, when claimant fell and injured his wrist. Claimant had a relationship with Pro Fleet as it was his initial contact regarding a job, it controlled the load and the location of the delivery and claimant began and ended his runs at Pro Fleet's facility. But claimant also had a relationship with PeopLease as he submitted numerous employment documents to PeopLease and was paid by that company.

K.S.A. 44-503(a) states:

> (a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor.

K.S.A. 2007 Supp. 44-503c(a)(1) states:

> (a) (1) Any individual who is an owner-operator and the exclusive driver of a motor vehicle that is leased or contracted to a licensed motor carrier shall not be considered to be a contractor or an employee of the licensed motor carrier within the meaning of K.S.A. 44-503, and amendments thereto, or an employee of the licensed motor carrier within the meaning of subsection (b) of K.S.A. 44-508, and amendments thereto, and the licensed motor carrier shall not be considered to be a principal within the meaning of K.S.A. 44-503, and amendments thereto, or an employer of the owner-operator within the meaning of subsection (a) of K.S.A. 44-508, and amendments thereto, if the owner-operator is covered by an

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[11] K.S.A. 2007 Supp. 44-501(g).

> occupational accident insurance policy and is not treated under the terms of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act, 26 U.S.C. § 3101 et seq., the federal social security act, 42 U.S.C. § 301 et seq., the federal unemployment tax act, 26 U.S.C. § 3301 et seq., and the federal statutes prescribing income tax withholding at the source, 26 U.S.C. § 3401 et seq.

K.S.A. 2007 Supp. 44-503c(a)(2)(c) states:

> (c) For purposes of subsection (b) of this section only, "owner-operator" means a person, firm, corporation or other business entity that is the owner of one or more motor vehicles that are driven exclusively by the owner or the owner's employees or agents under a lease agreement or contract with a licensed motor carrier; provided that neither the owner-operator nor the owner's employees are treated under the term of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act, 26 U.S.C. § 3101 et seq., the federal social security act, 42 U.S.C. § 301 et seq., the federal unemployment tax act, 26 U.S.C. § 3301 et seq., and the federal statutes prescribing income tax withholding at the source, 26 U.S.C. § 3401 et seq.

Claimant argues the application of K.S.A. 2007 Supp. 44-503c, but there is no information in this record to determine that claimant is an owner-operator as defined by the statute. Claimant is more an employee driving for a company whose business is delivering material by truck to locations around the United States. Thus, K.S.A. 2007 Supp. 44-503c is not applicable to this situation.

In the alternative, claimant also argues that he is a statutory employee of Pro Fleet. The exact relationship between Pro Fleet and PeopLease is not contained in this record. If PeopLease purchased Pro Fleet, then the rights and liabilities of that company would transfer and PeopLease would be responsible, as any workers compensation liabilities would also transfer. If, on the other hand, Pro Fleet and PeopLease remain separate legal entities, with Pro Fleet running the day-to-day operations and PeopLease being responsible for the administration of the company activities, then claimant would appear to be an employee of both, as was determined by the ALJ. The relationship of these companies cannot be determined by this record. What can be determined is that claimant has an ongoing contractual relationship with both companies, both appear to be insured by the same insurance company (Arch Insurance Group) and there is a workers compensation-related indemnity agreement between Pro Fleet and PeopLease.

The documents attached to the preliminary hearing transcript verify that claimant is an employee of PeopLease. But he performs driving duties for Pro Fleet. He would thus appear to be a lent employee or special employee of Pro Fleet. The term “special

employee" refers to a lent employee.[12] A special employee becomes the servant of the special employer and assumes the same position as a regular employee under the Workers Compensation Act.[13] Where the injured employee is determined to be both a special employee and a general employee, he or she may look to either or both of his or her employers for compensation.[14] This Board Member finds claimant to be a special employee of Pro Fleet while being an employee of PeopLease. Thus, claimant is free to pursue either employer. Thus, the determination by the ALJ that Pro Fleet is obligated to provide claimant with workers compensation benefits is affirmed. The ALJ did not exceed his jurisdiction in so determining.

This Board Member must next examine the actions of respondent's attorney and the insurance carrier in this matter. The ALJ issued his Order on June 4, 2008, awarding preliminary benefits against Pro Fleet. In a letter to claimant's attorney dated June 13, 2008, and filed with the Division on June 20, 2008, respondent's attorney stated:

> As you are aware, I have entered my appearance on behalf of Pro Fleet on the above-captioned matter. This means I now represent Pro Fleet Transportation and PeopLease through their insurance carrier, Arch Insurance Group, c/o Gallagher Bassett. I still believe that Kansas is not the proper jurisdiction. As such, please consider this our 7-day notice that benefits will be terminated.

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute.

It is clear neither K.S.A. 44-534a nor K.S.A. 2007 Supp. 44-510k limit an administrative law judge's ability to make determinations of ongoing disputed issues regarding pre- or post-award medical care.

K.S.A. 44-534a further states:

> If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award.[15]

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[12] *Scott v. Altmar, Inc.*, 272 Kan. 1280, 38 P.3d 673 (2002).

[13] *Bendure v. Great Lakes Pipe Line Co.*, 199 Kan. 696, 433 P.2d 558 (1967).

[14] *Bright v. Bragg*, 175 Kan. 404, 264 P.2d 494 (1953).

[15] K.S.A. 44-534a(a)(2).

There is nothing in the statute granting the attorney for respondent veto power over a preliminary hearing order. That review is reserved for the Board and then only when dealing with specific preliminary issues. If the threat outlined in the June 13, 2008 letter[16] is implemented, the procedures set forth in K.S.A. 44-5,120 could be brought into play.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[17] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant was an employee of Pro Fleet on January 11, 2008, when he fell in respondent's parking lot and injured his left wrist. The Order granting claimant preliminary benefits in the form of medical treatment and TTD is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated June 4, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August, 2008.

HONORABLE GARY M. KORTE

c: William L. Phalen, Attorney for Claimant
Samantha N. Benjamin-House, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

[16] The letter from Attorney Benjamin-House to claimant's attorney.

[17] K.S.A. 44-534a.